In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1063

CARL R. CARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there is no available standard under which they could be tried for conspiring to transport obscene materials in interstate commerce; that the conspiracy statute as applied to the statutes prohibiting such transportation is unconstitutionally vague and overbroad; and that jurors in the district in which they are to be tried are incapable of applying a community standard for the communities to which the obscene materials are transported for distribution.

Petitioners were charged in an eighty-eight count indictment with eighty-seven counts of transportation of obscene motion pictures in interstate commerce by means of a common carrier and transportation of obscene motion pictures in interstate commerce for the purpose of distribution, in violation of 18 U.S.C. 1462 and 1465, and with one count of conspiracy to violate those statutes in violation of 18 U.S.C. 371. Petitioners moved to dismiss the indictment. The district court granted petitioners' motion (Pet. App. B) and the court of appeals reversed *per curiam* (Pet. App. A).

1. The indictment charged petitioners with transportation of more than 30 obscene motion pictures from Memphis to Chicago, Memphis to Portland, Oregon, Memphis to Indianapolis, Chicago to Memphis, and Clarkesville, Tennessee, to Oakgrove, Kentucky. In addition, the conspiracy count charged petitioners with a large scale conspiracy to transport and distribute obscene motion pictures. In moving to dismiss the indictment petitioners argued that since there is no national standard for obscenity (citing *Miller* v. *California*, 413 U.S. 15) and "since only a national standard could be applied under these federal interstate transportation statutes, there is no available standard that could be applied in a trial charging violation of these statutes" (Pet. App. B 32). They urged, alternatively, that, if a local standard should be applied, it would not be the standard in the Western District of Tennessee where they were scheduled to be tried and that the jury therefore would be unable to apply the applicable standard. Even though expressing "considerable doubt as to the validity of these contentions" (Pet. App. B 32), the district court dismissed the indictment since these issues were also raised in ten other cases, in order to allow the court of appeals to resolve the issues prior to any of the trials. The court of appeals, relying on *Hamling* v. *United States*, 418 U.S. 87, and its own decision in *Smith* v. *United States*, 505 F.2d 824 (C.A. 6), rejected petitioners' contentions and reversed (Pet. App. A 29-30).

2. There is no occasion for the Court to review at this stage of the proceedings the issues petitioners raise. As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, in refusing to pass upon issues relating to the trial under an indictment whose facial validity was challenged:

> We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the im-

> mediate considerations which should determine the disposition of appellees' motions to dismiss an indictment incontestably valid on its face—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. [Citations omitted.]

Similarly, issues relating to the proper standards governing the trial of petitioners are not appropriate for this Court to consider at this time. Those issues are wholly premature, since the district court has not yet passed upon them and, indeed, properly can do so only in the context of a fully developed record. The indictment is valid on its face, and petitioners' contentions relate only to whether the charges in the indictment properly can be proved. All of the issues that petitioners now seek to have this Court determine can be fully raised and determined on appellate review if petitioners ultimately are convicted. Indeed, the proceedings in the trial court are essential to give the issues petitioners presented the requisite concreteness; what petitioners are now seeking from this Court is essentially an advisory opinion.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.